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No. 94-1898

Supreme Court, U.S.
FILED
JUN 19 1995
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1994

JACK J. GRYNBERG,

Petitioner,

v.

HENRY KLEIN, GUR SHOMRON, AMIRAM GRYNBERG and DEFENDISK, LIMITED, an Israeli Corporation,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court of Appeals
For The Tenth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Respondents do not believe that the questions as framed by Petitioner accurately reflect the question answered by the Tenth Circuit Court of Appeals in this case. The issue is whether the involuntary acceptance of an insufficient judgment moots the right to appeal.

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Gur Shomron, Amiram Grynberg and Defendisk, Limited, respectfully submit the following Brief in Opposition to Petition for Writ of Certiorari.

STATEMENT OF THE CASE

In this diversity case, a jury awarded Respondents in excess of $500,000.00 for breach of contract; $4.00 for breach of fiduciary duty; and $3,000,000.00 for punitive damages. The district court struck the punitive damages

award, which Respondents appealed to the Tenth Circuit Court of Appeals. While this appeal was pending, Respondents attempted to collect on the breach of contract judgment. At the request of Petitioner, the district court refused to allow Respondents to collect on this claim unless they also collected on the $4.00 breach of fiduciary duty judgment. Respondents did so only under protest. After insisting that Respondents accept this judgment, Petitioner then argued that by doing so, Respondents waived their right to appeal.

The Tenth Circuit correctly held that federal law applies to the appealability of a judgment in a diversity case. It then determined, based on the unique facts of this case, that the coerced satisfaction of a $4.00 judgment did not moot the appeal.

Petitioner's recitation of the procedure and factual background leading to the judgment in favor of Respondents is irrelevant to any of the issues he presents for review by this Court. Additionally, the Petitioner's discussion of the post-judgment enforcement proceedings, and the Tenth Circuit's rationale for rejecting the same arguments he now makes here, is based on misstatements of fact and law which have a bearing on the question of what issue, if any, should properly be before the Court if certiorari is granted.

REASONS FOR DENYING CERTIORARI

The appellate decision below was based upon facts unique to this case alone. As the Tenth Circuit Court of Appeals properly found:

> Plaintiffs did not voluntarily accept the $4.00 award for breach of fiduciary duty. In order to collect on the breach of contract claim, *they were compelled by the District Court* to collect on the breach of fiduciary duty claim, *and they did so only under protest*. Such an acceptance was not voluntary. Neither was it intended by the Plaintiffs to satisfy the judgment and bring the litigation to a conclusion. In this instance, Plaintiffs' acceptance did not act as a waiver of their right to appeal.

Petitioner's Appendix A at A-10 (emphasis added). The court then held, as a matter of federal law, that the coerced acceptance of an insufficient judgment by one party will not moot the appeal of another.

Petitioner argues that state law, the Colorado "Acceptance of the Benefits Rule," should have controlled the appealability of the judgment. However, because the court found that Respondents did not voluntarily accept the judgment, the question of whether federal or state law applies will make no difference to the outcome of this case. Even under Colorado's "Acceptance of the Benefits Rule," there must still be a "voluntary" acceptance of the benefits before an appeal will be mooted. *See Stenback v. Front Range Financial Corp.*, 764 P.2d 380, 383 (Colo. App. 1988). (Compliance with a court order, standing alone, will not be deemed a voluntary satisfaction of a judgment sufficient to preclude an appeal.)

These unique facts also prevent this case from having any broad applicability, even were the other necessary criteria for review by certiorari present. This case neither involves substantial questions of federal law on which lower courts are in need of guidance, nor presents any

controversy among the various Circuit Courts of Appeal. Instead, the highly fact-based issues involved in this decade old dispute have been appropriately resolved by the Tenth Circuit Court of Appeals in complete accord with the decisions of both this Court and other Circuit Courts of Appeal.

I. THE TENTH CIRCUIT RULING IS BASED ON FACTS UNIQUE TO THIS CASE ALONE.

A decision in this case must be bounded by the unique facts involved in the forced satisfaction, under protest, of the district court judgment. Respondents specifically objected to Petitioner's request that Respondents accept the $4.00 judgment, an acceptance under protest, which Petitioner now claims to have waived Respondents' rights to seek review of a judgment striking over $3,000,000.00 awarded to them by the jury. At the request of Petitioner, a show cause hearing was held before the trial court in which counsel for Petitioner argued that the $4.00 amount was necessarily included in an amount garnished from numerous parties, post-judgment. Counsel for Respondents argued that they did not seek the $4.00 for compensatory damages on the breach of fiduciary duty claims ("We don't want the $4.00 . . . ") and the trial court expressly recognized that this amount was the subject of a then pending appeal:

> Well, I'm not inclined to – if they don't want the money for the $4.00 claim and the claim is on appeal and they don't want a satisfaction for the $4.00 claim . . . I am not inclined to force them to satisfy a claim that is on appeal that they don't want to satisfy.

Show Cause Hearing, Tr. p. 26. Nevertheless, the trial court later refused to enter an order disbursing *any* of the funds in the registry of the court ($958,000.00) which the parties agreed was an amount necessary to satisfy the breach of contract claim (but not the breach of fiduciary duty claim), until the $4.00 issue was decided. Thus, to receive any of the money due them under the judgment on their first claim for relief, Respondents were forced to take the $4.00 on the second claim, and file a satisfaction of judgment on that claim. They did so only "under protest," to avoid further loss of the use of over $950,000, together with an additional $118.00 per day in interest. See Petitioner's Appendix D at D-12 through D-19. Under these circumstances, it is clear that the "satisfaction" of the breach of fiduciary duty judgment of $4.00 was anything but voluntary. Since there was no voluntary acceptance of the judgment, there was no waiver of the right to appeal, as the Tenth Circuit correctly held.

A party may accept what is securely his and appeal seeking more. *Kuba v. Risto Trucking Co., Inc.*, 811 F.2d 1053, 1055 (7th Cir. 1987). As the Tenth Circuit properly recognized, "[a]cceptance of payment of an unsatisfactory judgment does not, standing alone, amount to an accord and satisfaction precluding an appeal." Petitioner's Appendix A at A-9; citing *United States v. Hougham*, 364 U.S. 310, 312 (1960). Instead, in order to act as waiver of an appeal, "a party's acceptance must be voluntary and intended as satisfaction of the judgment." *Id.*; citing *H & S Industries*, 525 F.2d at 765; *Fidelcor Mortgage Corp. v. Insurance Co. of North America*, 820 F.2d 367, 370 (11th Cir. 1987).

Rather than unilateral action by one party to coerce acceptance of an insufficient judgment, what is needed to moot an appeal is the "mutual manifestation of an intention to bring the litigation to a definite conclusion upon a basis acceptable to all parties." *Id.* at A-9, A-10; quoting *Hawaiian Paradise Park Corp. v. Friendly Broadcasting Co.*, 414 F.2d 750, 752 (9th Cir. 1969) citing *Gadsden v. Fripp*, 330 F.2d 545, 548 (4th Cir. 1964); *See* also *Commercial Union Insurance Co. v. Walbrook Insurance Co., Ltd.*, 41 F.3d 764, 768-769 (1st Cir. 1994). That mutual intention did not exist in this case.

II. THERE IS NO CONFLICT AMONG THE CIRCUITS AND THE TENTH CIRCUIT OPINION IS CONSISTENT WITH THIS COURT'S PRIOR OPINIONS.[1]

In support of his argument that there exists an irreconcilable conflict between the circuits with respect to "the existence or application of a rule that effects an end to litigation [as a result of the acceptance of a benefit of a judgment]," Petitioner points to the decisions of the Tenth and Seventh Circuits, on the one hand, and the Eleventh

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[1] Petitioner's argument that there is apparent confusion as to the application of federal or state law on the issue of the appealability of that judgment, is also without merit. Petition at 9. Petitioner admits that the Seventh and Tenth Circuits find federal law determinative, and the most recent and only Eleventh Circuit case to squarely address the issue found federal common law applicable with respect to the appealability of a satisfied judgment. *See Crawford v. Andrew Systems, Inc.*, 39 F.3d 1151, 1153 (11th Cir. 1994).

Circuit, on the other hand. Petition at 10 and 11. However, Petitioner's reliance on *Zaklama v. Mount Sinai Medical Center*, 906 F.2d 645 (11th Cir. 1990) and *Wynfield Inns v. Edward LeRoux Group, Inc.*, 896 F.2d 483 (11th Cir. 1990) is misplaced. The purported conflict between the cases and the Tenth Circuit's Opinion is entirely attributable to certain dispositive factual distinctions between the cases.

In *Zaklama*, the prevailing party attempted to avoid the denial of an untimely motion for statutory attorney fees by appealing the underlying judgment on which he had executed and obtained satisfaction. *Zaklama v. Mount Sinai Medical Center*, 906 F.2d at 647. The Eleventh Circuit properly held that, because Zaklama had voluntarily pursued a writ of execution on the judgment and had voluntarily filed a satisfaction of judgment, Zaklama was unable to appeal the decision. *Id.* at 650.

Likewise, in *Wynfield Inns*, Wynfield Inns attempted to appeal a directed verdict for the defense on a breach of contract action while at the same time, taking steps to collect on a judgment on its alternative quantum meruit claim. *Wynfield Inns v. Edward LeRoux Group, Inc.*, 896 F.2d at 487. The court held that because Wynfield Inns had voluntarily accepted the Defendants' payment of the quantum meruit damages, the appeal was barred on the contract claim since the "quantum meruit and contract remedies are inconsistent, mutually exclusive and alternative measures of recovery." *Id.* at 489. Thus by pursuing the quantum meruit damages, Wynfield Inns had made an election of its remedy, under the quantum meruit claim, thereby precluding it from later attempts to pursue an inconsistent remedy under the contract claim. *Id.*

When read in context, neither *Zaklama*, nor *Wynfield Inns* is inconsistent with the Tenth Circuit's holding in this case, where "voluntary" action on the part of Respondents was expressly found to be lacking. *See*, also *Fidelcor Mortgage v. Insurance Company of North America*, 820 F.2d at 370 (waiver of the right to appeal only occurs where there has been a voluntary and intentional acceptance of the substantial benefits of a judgment).

Finally, for the same reason, the Tenth Circuit's opinion is entirely consistent with the prior Supreme Court opinions regarding the effect of the acceptance of the benefits of a judgment on that judgment's appealability. In *United States v. Hougham*, 364 U.S. at 312, this Court held that "acceptance of payment of an unsatisfactory judgment does not, standing alone, amount to an accord and satisfaction of the entire claim." The Tenth Circuit's opinion is not to the contrary: A party's acceptance must be voluntary and intended as satisfaction of the judgment. *See* Petitioner's Appendix A at A-9. Also consistent is *United States v. Dashiel*, 70 U.S. 268, 3 Wall. 688 (1866), where this Court properly recognized that it is only "when the property is lost to the debtor *in consequence of the legal measures which the creditor has pursued*, the debt . . . is gone. . . . " *Id.* at 269 (emphasis added). Unlike the circumstances contemplated in *Dashiel*, Respondents did not voluntarily pursue any legal measures to recover either the $4.00 breach of fiduciary duty claim or the punitive damages claim, and therefore did not lose their right to appeal the erroneous striking of their punitive damages claim.

CONCLUSION

The Tenth Circuit Court of Appeals properly applied this Court's precedent to deny Petitioner's attempt to unilaterally moot Respondents' appeal. The record below is clear: No one was under the impression that this ten year long litigation had been resolved by mutual agreement or voluntary satisfaction of a $4.00 judgment. Respondents request that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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